STATE OF MICHIGAN

COURT OF APPEALS

PELLERITO FOODS, INC., Plaintiff-Appellant,	UNPUBLISHED November 30, 1999
v	No. 202868 Wayne Circuit Court
DEBACKER POTATO FARMS, INC., Defendant-Appellee.	LC No. 95-506191 CK AFTER REMAND

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appealed as of right from an order of the trial court entering a judgment of no cause of action on plaintiff's breach of contract claim and a judgment in favor of defendant on defendant's breach of contract counterclaim. We remanded the case for further factual findings and for an evidentiary hearing regarding the award of mediation sanctions. *Pellerito Foods, Inc v Debacker Potato Farms, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 1998 (Docket No. 202868). This case is now before us after remand. We affirm.

Plaintiff contends that the trial court made numerous findings of fact that amounted to clear error. We disagree. This Court reviews a trial court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *Erb Lumber v Gidley*, 234 Mich App 387, 392-393; 594 NW2d 81 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8-9; 596 NW2d 620 (1999). When reviewing a trial court's findings of fact, regard must be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

First, plaintiff argues that the trial court's finding that the contract required that eighty-five percent of the potatoes meet the USDA requirements for number one grade was inaccurate and incomplete because it ignored other contract terms. We find no clear error in the trial court's finding. The contract provided that the potatoes be "85% U.S. #1 or better." Furthermore, it is clear from the trial court's findings of fact that the trial court was aware of the other contract terms.

Plaintiff next argues that the trial court clearly erred in finding that it was not persuaded that the USDA inspection included only potatoes delivered by defendant and that, therefore, plaintiff could not use the findings of that inspection as proof that defendant breached the contract. The inspector, Dennis Cranford, testified that he could not be sure that the potatoes he inspected were the potatoes delivered by defendant. A potato farmer, Richard Erickson, testified that he observed potatoes from one supplier being mixed into a bin with potatoes from another supplier at plaintiff's facility. Although Pellerito testified that the potatoes inspected were the ones delivered by defendant, we recognize the trial court's superior ability to judge the credibility of the witnesses that appeared before it. MCR 2.613(C). Thus, we find no clear error in the trial court's finding.

Plaintiff next argues that the trial court clearly erred when it found that defendant offered to travel from the upper peninsula to inspect the potatoes with Pellerito, but that Pellerito refused the offer the day before he declared a breach of the contract. DeBacker testified that he offered to drive to plaintiff's facility to inspect the potatoes with Pellerito, but that Pellerito refused the offer. Moreover, despite plaintiff's statement in its brief on appeal that "[t]he bottom line is that Pellerito never refused any offer by DeBacker that DeBacker travel to Pellerito's facility with a load for a USDA inspection in both their presence," Pellerito gave the following testimony at trial:

> *Defense counsel:* And, sir, so you admit that Mr. DeBacker in February of 1995 had a conversation with you on the telephone [sic] asked or suggested and offered to come down to Detroit himself with a load of potatoes so that you could both be present during an inspection?
>
> *Pellerito:* Yes.
>
> *Defense counsel:* And that you rejected that request?
>
> *Pellerito:* Yes.

In light of Pellerito's testimony, it is evident that the trial court's finding was not erroneous.

Next, plaintiff contends that the trial court clearly erred when it found that the market price for potatoes had fallen at the time defendant attempted to mitigate his damages. The contract between plaintiff and defendant provided for a price of $6.25 per hundred weight of potatoes. The testimony of three individuals who purchased potatoes from defendant from February, 1995 to June, 1995 indicated that the price for potatoes was low at that time. Daniel Steinbrecher testified that the market price for 85% USDA number one grade potatoes was approximately $3.25 to $3.50 per hundred weight, plus $2.00 per hundred weight for shipping the potatoes to Detroit, for a total of approximately $5.25 per hundred weight if the potatoes were delivered to Detroit. Dwayne Merringer testified that he purchased potatoes from defendant that were probably 90% USDA number one grade for $3.50 per hundred weight.[1] Merringer testified that the "market was bad that year," and that the price he paid was "right around the market rate maybe even a little bit below the market." Brian Bushman, who purchased potatoes from defendant for $2.82 per hundred weight, non-delivered, testified that the price for

potatoes usually rises in the spring, but that it did not do so in the spring of 1995. On the basis of such testimony, we find no clear error in the trial court's finding.

Plaintiff further argues that the trial court clearly erred in finding that the low market price was the reason defendant could not completely mitigate his damages. Plaintiff asserts that defendant did not receive the contract price for the potatoes because the quality of the potatoes did not warrant 85% USDA number one grade prices. However, Merringer testified that the potatoes he purchased from defendant were 90% USDA number one grade. Although Bushman testified that the potatoes he purchased from defendant were 75% USDA number one grade, Bushman purchased "field-run" potatoes, meaning that the potatoes were taken directly from defendant's field or bin, before they were sorted by defendant. In addition, Steinbrecher testified that the potatoes he purchased were "field-run" potatoes. Plaintiff has not shown that the trial court clearly erred in finding that defendant could not fully mitigate his damages due to the low market price.

Next, plaintiff argues that the trial court erred in relying on the testimony of defendant's expert, Richard Leep. In its findings of fact, the trial court stated that "Professor Leep of M.S.U. ran tests on defendant's potatoes immediately after plaintiff terminated the contract. He determined the potatoes were Russet Burbanks and were 80 to 85% U.S.D.A. grade number one." Plaintiff first argues that the trial court erred in relying on Leep's testimony because Leep admitted that he did not grade the potatoes he inspected to determine whether they met the size and quality requirements of the contract. Leep testified that he was familiar with the USDA grading scale and that for the past twenty years he evaluated potatoes according to the USDA scale when conducting variety trials. He further testified that, although he did not do a size distribution and did not make any notation with respect to cracks, dry rot, or other defects, he observed the size and condition of the potatoes while he was conducting the specific gravity tests. Therefore, in light of Leep's experience with potatoes, the trial court did not err in considering Leep's opinion regarding the condition and quality of the potatoes at issue.

Plaintiff further argues that Leep's conclusion that the potatoes were 80% to 85% USDA number one grade supports its position that defendant breached the contract, which required 85% USDA grade one potatoes. Plaintiff also challenges Leep's testimony on the basis that Leep only evaluated approximately one hundred pounds of potatoes chosen by defendant and, thus, his results were not reliable with respect to the entire quantity at issue. However, the trial court's findings of fact indicate that the court relied on other evidence in addition to Leep's testimony as the basis for its finding that the potatoes met the requirements of the contract. The credibility of, and the weight to be given, Leep's testimony was for the court to decide. MCR 2.613(C). We find no reversible error in the trial court's consideration of Leep's testimony.

Plaintiff next argues that the trial court erred in concluding, contrary to MCL 440.1207(1); MSA 19.1207(1), that plaintiff waived its right to contest defendant's compliance with the contract because it kept and used the potatoes delivered by defendant. MCL 440.1207(1); MSA 19.1207(1) provides:

> A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not

> thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

Contrary to plaintiff's argument, the trial court did not conclude that plaintiff waived his right to contest defendant's compliance with the contract by using the potatoes. In its findings of fact, the trial court noted that plaintiff protested fourteen loads of potatoes delivered before January 26, 1995. However, the trial court found that plaintiff's protest was not meritorious. In light of the trial court's finding that plaintiff's protest was not meritorious, we find no error in its statement that plaintiff "misuses the legal process to delay paying for potatoes he knows he has processed and sold without paying for them."

Plaintiff next contends that the trial court clearly erred in entering a judgment of no cause of action on its breach of contract claim. Essentially, plaintiff argues that the trial court's decision was against the great weight of the evidence. We disagree. A verdict may be overturned on appeal only when it was manifestly against the clear weight of the evidence. *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996).

After having reviewed the record, we conclude that the trial court's decision was not against the great weight of the evidence. Defendant presented competent evidence in defense of plaintiff's claim that defendant breached the contract. While the parties presented conflicting evidence, we defer to the trial court's resolution of credibility disputes. MCR 2.613(C). We are not convinced that the verdict was "manifestly against the clear weight of the evidence." *Watkins, supra*.

Plaintiff next argues that the trial court erred in awarding mediation sanctions in the amount of $38,382. We disagree. This Court reviews a trial court's decision whether to grant mediation sanctions de novo because it involves a question of law, not a discretionary matter. *Great Lakes Gas Transmission, Ltd, v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). The amount of sanctions awarded is reviewed for an abuse of discretion. *Put v FKI Industries, Inc*, 222 Mich App 565, 572; 564 NW2d 184 (1997).

When determining a reasonable attorney fee, the court must consider the factors set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1992). While the court is required to make findings of fact with respect to the attorney fee issue, it need not detail its findings with respect to each factor it considered. *Id.* Here, pursuant to our remand order, the trial court held an evidentiary hearing at which it heard evidence and argument regarding the factors set forth in *Wood, supra*. On the basis of the evidence presented, the trial court reduced the fee requested for attorney Garratt's services from $220 per hour to $150 per hour. We find no abuse of discretion in the amount of mediation sanctions awarded by the trial court.

Plaintiff next argues that the trial court erred in ruling in favor of defendant on defendant's counterclaim. We disagree.

Plaintiff first argues that the trial court erred in concluding that plaintiff breached the contract by failing to pay for the delivered loads of potatoes because MCL 440.1207(1); MSA 19.1207(1)

permitted plaintiff's conduct. However, as discussed above, the trial court did not ignore MCL 440.1207(1); MSA 19.1207(1), but found that plaintiff's protest of the shipments was not meritorious. Similarly, because the trial court found that defendant did not breach the contract, we find no merit in plaintiff's argument that the trial court erred in concluding that plaintiff was the first party to breach the contract. In fact, the trial court found that plaintiff was the only party that breached the contract. Thus, we find no error.

Finally, plaintiff contends that defendant's counterclaim for damages for the undelivered loads should have been dismissed because, due to defendant's breach of the contract, plaintiff was entitled, pursuant to the contract, to cancel future deliveries under the contract. Again, because the trial court concluded that defendant did not breach the contract, there is no merit in plaintiff's argument.

We therefore affirm the trial court's order entering judgment of no cause of action with respect to plaintiff's complaint, and entering judgment in favor of defendant with respect to defendant's counterclaim. We affirm the trial court's order awarding mediation sanctions to defendant.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[1] Merringer's potato farm was approximately twenty miles from defendant's farm. Thus, the cost of delivering the potatoes to Detroit did not apply.